

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Request for Review of Decision of the)	
Universal Service Administrator by)	CC Docket No. 96-45
)	
Vycera Communications, Inc.)	
)	
Request for Waiver of Section 54.706(c))	
Of the Commission's Rules)	

**REQUEST FOR REVIEW OF DECISION OF THE UNIVERSAL SERVICE
ADMINISTRATOR BY VYCERA COMMUNICATIONS, INC., OR IN
THE ALTERNATIVE, REQUEST FOR A WAIVER OF SECTION 54.706(c) OF
THE COMMISSION'S RULES**

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I. INTRODUCTION AND SUMMARY

Vycera Communications, Inc. ("Vycera") by its undersigned counsel, and in accordance with Sections 54.719(c) and 54.722 of the Commission's Rules,¹ appeals a decision of the Universal Service Fund ("USF") Administrator. Specifically, Vycera appeals a letter decision issued June 8, 2005, by the Universal Service Administrative Company ("USAC"), in which USAC affirmed a previous determination that Vycera's eligibility for the Limited International Revenues Exemption ("LIRE" or "12 percent rule") should be based on USAC's calculation of Vycera's percentage of interstate revenue for the final nine months of 2003, rather than, in accordance with Section 54.706(c) of the Commission's Rules,² Vycera's percentage of interstate revenue for the entire 2003 calendar year.

¹ 47 C.F.R. §§ 54.719(c), 54.722 (2005).

² 47 C.F.R. § 54.706(c) (2005).

USAC based this determination on its interpretation of the FCC's true-up policy for calendar year 2003 revenue, as outlined in the Commission's *Reconsideration Order*,³ which used only the final nine months of 2003 for calculating the annual true-up. For the reasons outlined below, this "transitional" true-up conducted during the Commission's change to assessing USF on "projected, collected" revenue, rather than historical, billed revenue is inappropriate for calculating Vycera's eligibility for the LIRE. Carriers with limited interstate revenues are entitled to the LIRE under Section 254 of the Act, applicable judicial precedent, and the Form 499-A instructions. To allow the transition period to essentially "trump" the LIRE calculation for a carrier that would otherwise qualify for the LIRE violates the Act, judicial precedent and Commission policy.

Because of USAC's incorrect application of the Act and Commission rules, Vycera would contribute nearly 70 percent of its interstate revenue during the second through fourth quarters of 2003 into the USF. Such a result is clearly contrary to the intent of the LIRE and is a wholly inequitable result. Moreover, it is exactly this form of inequity that the LIRE is designed to prevent. As such, USAC's determination of June 8, 2005, should be reversed by the Commission, and Vycera's eligibility for the LIRE should be based on the percentage of interstate revenue for the entire 2003 calendar year.

In the alternative, Vycera seeks a waiver of the Commission's rules to allow USAC to calculate Vycera's LIRE eligibility and USF liability based on Vycera's actual percentage of annual revenue for the calendar year 2003, rather than Vycera's percentage of interstate revenue over the last nine months of 2003. The Commission has granted waivers to allow calculations to be based on actual, rather than projected revenue,

³ *In the Matter of Federal-State Joint Board on Universal Service, et al*, CC Docket 96-45, et al, *Order and Second Order on Reconsideration*, FCC 03-58, (2003) ("*Reconsideration Order*").

numerous times when using projected revenue would create an inequitable result in individual circumstances, especially when inequitable results would arise as a result of the Commission's transition from calculating USF contributions based on historical revenue to collected, projected revenue.⁴ In this case, granting a waiver would avoid the inequitable result of Vycera contributing nearly 70 percent of its interstate revenue to the USF, solely as a result of the transition in USF methodology.

II. SUMMARY OF FACTS

Vycera is a competitive local and long distance carrier that provides a full suite of low-cost local, long distance, international and enhanced calling services for the fast-growing U.S. Hispanic population. Focused exclusively on serving Spanish-speaking consumers, Vycera offers special rates and customized calling plans that are priced between 10 and 45 percent less than competitive offerings to México, Latin America and domestically. Because of this emphasis on serving the Hispanic community, Vycera has traditionally had a very high percentage of its revenue derived from international calling.

On or about April 1, 2004, Vycera filed its original Form 499-A, in accordance with Section 54.711(a)⁵ of the Commission's rules. In this filing, Vycera indicated that it had \$5,122,990.00 in international revenue and \$385,600.00 in interstate revenue for calendar year 2003, or about 6.79 percent interstate revenue under the LIRE calculation set forth in the Form 499-A instructions. On or about September 29, 2004, Vycera revised its Form 499-A and reported \$4,038,936.00 in international revenue and \$540,873.00 in interstate revenue. This revision resulted in an interstate percentage of 11.8 percent under the LIRE calculation set forth in the 499 instructions.

⁴ See, *infra*, note 20. The Commission is specifically authorized to grant waivers of its rules when such a waiver would be equitable. 47 C.F.R. § 1.3 (2005).

⁵ 47 C.F.R. § 54.711(a).

In response to this revised worksheet, USAC sent Vycera an invoice, dated October 22, 2004, in which USAC revised the annual true-up adjustments it had previously invoiced. These adjustments resulted in an additional \$295,022.58 in contribution by Vycera, despite having a mere \$540,873.00 in interstate revenue in 2003.⁶

In conversations with USAC, Vycera determined that this true-up was based on USAC applying the transitional true-up to determine whether Vycera qualified for the LIRE. Instead of looking at Vycera's entire annual revenue and the associated percentage of interstate and international revenue, USAC instead looked only at the final nine months of Vycera's 2003 revenue to determine if Vycera qualified for the LIRE. In defending this calculation, USAC personnel informed Vycera that due to the FCC's transition from calculating USF based on historic revenue to projected, collected revenue, the LIRE would not be calculated based on the actual percentage of interstate revenue for the calendar year 2003. As a result of USAC's decision, Vycera failed to qualify for the LIRE for the first time in company history.

Vycera appealed this determination to USAC by letter dated December 14, 2004. Vycera's appeal argued that USAC had misapplied the true-up by using only three quarters of revenue to determine if Vycera qualified under LIRE, contrary to section 54.706(c) of the Commission's rules. By letter dated June 8, 2005, USAC affirmed its decision and denied Vycera's appeal.

USAC's decision concluded that the transition to assessing USF on projected, collected revenue created a situation where not only would the assessments for true-up

⁶ Of this figure, approximately \$147,000 was in the first quarter of 2003. As described below, the first quarter of 2003 was not subjected to USF contribution due to the transition period during the change in USF contribution methodology. As such, Vycera's effective contribution rate on the relevant interstate revenue during the second through fourth quarters is nearly 70 percent.

purposes be based on only three quarters of revenue from 2003, but the LIRE determination would also be based on only three quarters of revenue. Further, consistent with the true-up practice used by USAC for the 2003 calendar year revenue, the revenue for those three quarters was determined by subtracting from its annual revenues Vycera's reported projected revenue for the first quarter 2003, rather than Vycera's actual revenue from that quarter. As discussed further below, USAC's analysis of the manner in which it should calculate the LIRE is legally flawed.

III. APPEAL OF DECISION OF THE UNIVERSAL SERVICE ADMINISTRATOR

A. The LIRE Exemption

The LIRE has been in existence since 1999, and was established in response to an order of the U.S. Court of Appeals for the 5th Circuit.⁷ In this decision, the court ruled that, in certain circumstances, requiring carriers to contribute on their international revenue could constitute an inequitable assessment of USF in violation of the Act. The Commission chose to address this problem by adopting a rule to ensure that certain primarily international carriers, like Vycera, do not contribute to the USF on their international revenue.

The Commission's rules state that a carrier whose total interstate revenue is 12 percent or less of its combined international and interstate revenue is subject to USF contribution only on the interstate portion of its revenue.⁸ This rule has been implemented in part through the Form 499-A instructions, which include a table to determine, among other things, whether the filer's contribution base includes its

⁷ *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 392 (5th Cir. 1999) ("*Texas OPUC*").
⁸ 47 C.F.R. § 54.706(c)

international revenues and an explanation of when a filer's international revenues will be excluded from the contribution base.⁹

B. The Transitional True-up Mechanism

In December 2002, the Commission revised its USF collection methodology to a collection method based on projected, collected revenue rather than historical revenue.¹⁰ As a result of this change, the first quarter 2003 was never the basis for USF contribution.

In order to adjust for errors in revenue projections, the Commission also adopted a true-up process "to ensure that interstate telecommunications providers contribute appropriate amounts to the universal service mechanism based on quarterly revenue data."¹¹ For the calendar year 2003, however, the Commission directed USAC to use only the second through fourth quarters in the true up process. To determine a carrier's revenue for these three quarters, the Commission directed USAC to subtract a carrier's reported estimated revenue for the first quarter of 2003 from the annual revenue reported on the April 1, 2004 Form 499-A. This difference would be considered a carrier's revenue for the last nine months of 2003 for purposes of calculating the annual true-up.

C. USAC Erred in Applying the True-up Mechanism to the LIRE

The USAC decision undermines the Commission's LIRE rule and the *Texas OPUC* decision, as it forces Vycera, a carrier that has less than 12 percent annual interstate revenue, to contribute a substantial portion of its interstate revenue into the USF. Such a result is clearly inconsistent with the FCC's LIRE policy as well as the underlying *Texas OPUC* decision. USAC has, instead of focusing on correctly applying

⁹ Form 499-A Instructions at 6, 29 (2004).

¹⁰ *In the Matter of Federal-State Joint Board on Universal Service, et al* CC Docket 96-45, *et al*, Report and Order and Second Further Notice of Proposed Rulemaking, FCC 02-329 (2002).

¹¹ *Reconsideration Order* at 15.

the LIRE rules, used the transition period true-up policy as an excuse to violate the LIRE rule. The result is an absurd anomaly, where a carrier who reported all four quarters under the 12 percent threshold must contribute to USF on both its interstate and international revenue in direct violation of Rule 54.706(c).

In responding to the *Texas OPUC* decision, the FCC adopted 54.706(c) to avoid situations such as these, where a largely international carrier will pay all, or nearly all, of its interstate revenue in USF contribution.¹² USAC's attempt to require contribution on all international revenue through the true-up process results in Vycera contributing nearly 70 percent of Vycera's total interstate revenue from the second through fourth quarters of 2003 to USF.

Nothing in the *Reconsideration Order* permits or even implies that a carrier's LIRE eligibility can be altered by application of the transition period true-up. In clarifying the true-up process during the transition period, the FCC noted only that revenue related to the first quarter 2003 would not be subject to the true-up process.¹³ Further, to the extent that the FCC describes the true-up methodology in this Order, it discusses only a means of subtracting estimated first quarter revenue from the contribution base,¹⁴ and says nothing regarding the LIRE calculation under Section 54.706(c). In other words, the relevant section of the Commission's rules, Section 54.706(c), and not the Commission's *Reconsideration Order*, governs the assessment of Vycera's international revenue.

¹² *In the Matter of Federal-State Joint Board on Universal Service, Access Charge Reform, CC Docket 96-45, et al, Sixteenth Order on Reconsideration in CC Docket 96-45, Eighth Report and Order in CC Docket 96-45, Sixth Report and Order in CC Docket 96-262*, 15 FCC Rcd. 1679 (1999) ¶¶ 15-16 (establishing an 8 percent threshold, subsequently raised to 12 percent by FCC 02-43) (February 2002).

¹³ *Reconsideration Order*, at 13.

¹⁴ *Id.* at 16.

While the FCC was revising its collection methodology, it clearly expressed its intent for the continuation of the so-called 12 percent rule by amending Section 54.706(c) to reflect the change to projected, collected revenues as a contribution methodology. Nothing in this rule change, nor the subsequent *Reconsideration Order* (which did not amend Section 54.706(c)), alters or limits this long standing, and court mandated, Commission regulation that requires calculation of LIRE eligibility based on annual revenue.

Lastly, the facts show the absurdity of USAC's calculation. During the entirety of 2003, while reporting its revenues, Vycera was under the 12 percent threshold. Even if one accepts USAC's attempts to use the *Reconsideration Order* to trump Rule 54.706(c), these actions cannot be squared against Section 54.706(c)'s clear mandates regarding carriers who provide primarily international services. In unlawfully applying the formula in the *Reconsideration Order* to deny Vycera its LIRE status, USAC has failed to adhere to established Commission rules regarding assessment of USF on predominantly international carriers.

D. The Commission Should Reverse USAC

USAC's approach is inconsistent with the Commission's long standing rules regarding the LIRE. As such, Vycera requests that the Commission rule that USAC erred in its calculation of the LIRE and find that, because Vycera's total annual revenue for 2003 was less than 12 percent interstate, Vycera qualifies for the LIRE. USAC should be directed to recalculate Vycera's USF obligations based solely on Vycera's interstate revenue.

IV. REQUEST FOR A WAIVER

In the event that the Commission does not grant Vycera's appeal, Vycera, requests, in the alternative, pursuant to Section 1.3 of the Commission's Rules,¹⁵ that the Commission grant a waiver of its rules to permit Vycera to qualify under the LIRE based on its actual interstate percentage of revenue for the entire calendar year of 2003. For the reasons detailed below, Vycera believes such a waiver is equitable and consistent with the Act as interpreted by *Texas OPUC* as well as prior Commission waivers relating to the transition from historical revenue to projected, collected revenue.

Section 1.3 provides that the Commission may waive its rules "if good cause therefore is shown."¹⁶ Generally, a waiver is appropriate if "special circumstances warrant deviation from the general rule and such deviation will serve the public interest."¹⁷ A waiver is appropriate here because of the unique circumstances of the change in the rules that affect only the first quarter of 2003 and only companies, such as Vycera, that under-projected their revenues for that quarter. This transition process clearly places Vycera at an unfair disadvantage by requiring Vycera to pay true-up amounts in excess of the appropriate contribution based on its actual interstate percentages for the entire 2003 calendar year.

As noted above, USAC based its calculations, in part, on the Commission's true-up order that requires USAC to subtract first quarter 2003 revenue projections from the actual revenues reported on the 499A when calculating the 2003 true-up.¹⁸ Like numerous other carriers such as AT&T Corporation (AT&T), SBC Communications,

¹⁵ 47 C.F.R. § 1.3.

¹⁶ 47 C.F.R. § 1.3

¹⁷ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990); see also *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969).

¹⁸ *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45 et al., Report and Order and Second Further Notice of Proposed Rulemaking, FCC 02-239, ¶¶20, 36, rel. December 13, 2003.

Verizon and New Edge Networks, Inc, Vycera under-estimated its revenue for first quarter of 2003 and, without waiver, would pay a higher amount than is warranted into the USF. Unfortunately, because the contribution methodology change became effective after the first quarter of 2003, carriers that under-projected their first quarter 2003 revenues, like Vycera, will pay more than the “appropriate amount” unless the Commission changes the true-up process for 2003 or grants a waiver of these provisions. This result is particularly inequitable given that USAC’s calculations based on projected revenue resulted in Vycera failing to qualify for the LIRE and therefore contributing nearly all of its interstate revenue to USF.

Section 254 of the Act requires that interstate telecommunications providers contribute to the universal service mechanisms on an equitable and nondiscriminatory basis.¹⁹ Consistent with the intent of the Section 254, this Commission found in Order FCC 04-170 that “Petitioners would contribute more than an equitable share, because they would be assessed a larger true-up amount under the current true-up process than would otherwise occur, because they under projected their first quarter 2003 revenues.”²⁰ This Commission went on to conclude “that the Petitioners have demonstrated special circumstances that warrant deviation from the Commission’s universal service true-up procedures for 2003” and that “this result is consistent with the public interest.”²¹ With this backdrop, the Commission waived the current true-up procedures for AT&T, SBC Communications and Verizon.

In Vycera’s case, the circumstances are even more significant. Because USAC subtracted the under-reported first quarter revenue during the true-up process, it created a

¹⁹ 47 U.S.C. § 254(d).

²⁰ FCC 04-170, CC Docket No. 96-45, Released July 20, 2004.

²¹ *Id.*

mathematic anomaly whereby the one-time transition period true-up rule had the effect of substantively changing Vycera's USF assessment and its eligibility for LIRE. Granting the waiver requested would be consistent with the premise underlying the prior waivers cited above. In these instances, the Commission granted waivers to carriers who were placed at a disadvantage because of the transitional true-up procedures. The consequence to Vycera would be the same: to avoid having the transition period true-up create a substantive detrimental impact on Vycera's USF contributions. Moreover, such a waiver would be equitable, in that it would allow Vycera, with annual interstate revenue that was less than 12 percent of its total interstate and international revenue in 2003, to qualify for the LIRE. It is this concept of annual revenue that has been critical to the LIRE since its inception.

Accordingly, if the Commission denies its appeal, Vycera respectfully requests that the Commission grant it a waiver and allow the Administrator to calculate Vycera's eligibility for the LIRE for calendar year 2003 revenue using the interstate and international percentages contained in Vycera's revised Form 499-A. By granting this waiver, the Commission would base the 2003 LIRE calculations on the actual annual revenue rather than merely a netted out calculation of the revenue for the final three quarters of 2003. Such a waiver will result in Vycera qualifying for the LIRE and avoid the inequitable result of denying Vycera its LIRE exemption merely because of the transitional mechanism applied for 2003 contribution true-ups.

V. CONCLUSION

Vycera respectfully requests that the Commission reverse USAC's determination of June 8, 2005 that Vycera does not qualify for the LIRE in 2003. In the alternative, Vycera seeks a waiver as described herein, to permit USAC to calculate Vycera's eligibility for the LIRE based on the company's actual interstate percentages for calendar year 2003.

Respectfully submitted,



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